

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the Application of)
Manfred Piontek) Examiner: Tarla Patel
)
on HEADREST FOR A) Art Unit: 3772
PATIENT-BEARING SURFACE)
) Confirmation No. 8927
Serial No.: 10/534,837)
)
Filed: July 22, 2005) (Our Docket No.
) 2619-0038WOUS)

Hartford, Connecticut, September 3, 2009

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Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

APPEAL BRIEF IN ACCORDANCE WITH 37 CFR § 41.37
AND PETITION FOR EXTENSION OF TIME

S I R:

This Appeal is taken from the Office Action dated March 4, 2009, and is in keeping with the Notice of Appeal, filed June 4, 2009, having a period of response set to expire on September 4, 2009 with a one-month extension of time. Applicant requests review of the rejection of claims 1 and 3-8 in the above-identified application.

TABLE OF CONTENTS

(I)	Real Party in Interest	3
(II)	Related Appeals and Interferences	4
(III)	Status of Claims.....	5
(IV)	Status of Amendments	6
(V)	Summary of Claimed Subject Matter	7
(VI)	Grounds of Rejection to be Reviewed on Appeal.....	14
(VII)	Argument.....	15
(VIII)	Claims Appendix	31
(X)	Evidence Appendix	34
(XI)	Related Proceedings Appendix	35

Application No. 10/534,837
Office Action dated March 4, 2009
Appeal Brief dated September 3, 2009

(I) Real Party in Interest

The real party in interest in the subject patent application is the assignee of the entire interest, Maquet GmbH & Co. KG of Kehler Strasse 31, Rastatt, Germany 76437, as evidenced by the assignment recorded with the U.S. Patent and Trademark Office on December 22, 2005, Reel 016932, Frames 0907.

(II) Related Appeals and Interferences

There are no other Appeals or Interferences known to Applicant or Applicant's legal representative, which will directly affect or be directly affected by or have a bearing on the Board's decision on the pending Appeal.

(III) Status of Claims

Claims 1 and 3-9 are pending in the application. Claim 2 was previously canceled. Claims 1 and 9 are independent claims. No claims have been withdrawn from consideration. Claims 1 and 3-9 stand rejected for, at least, the second time.

Claims 1 and 3-9, as they currently stand, are set forth in the Claim Appendix. Applicant hereby appeals the second or subsequent rejection of claims 1 and 3-9.

Application No. 10/534,837
Office Action dated March 4, 2009
Appeal Brief dated September 3, 2009

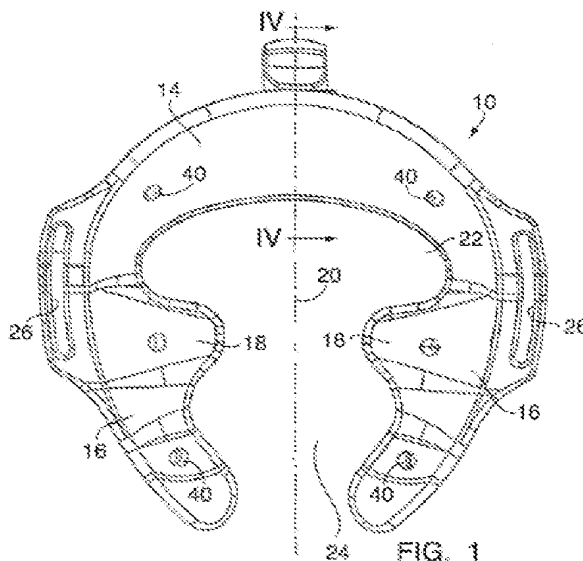
(IV) Status of Amendments

There are no outstanding claim amendments. No claim amendments were made subsequent to the March 4, 2009 Office Action. All prior amendments have been entered.

(V) Summary of Claimed Subject Matter

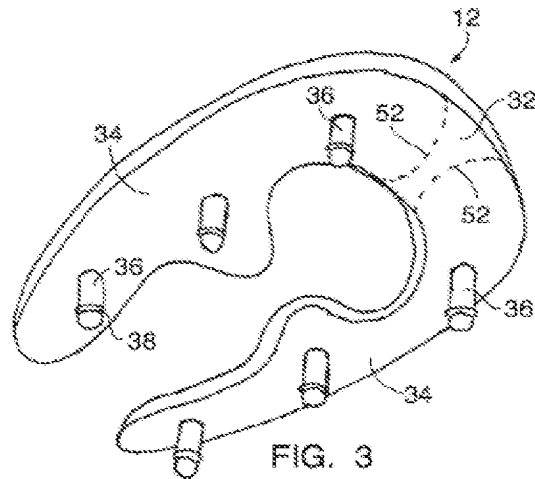
As seen below in Figure 1 of the present invention, Applicant's invention is directed to a headrest for a patient-bearing surface, for example, an operating table. (Specification, paragraph [0002]). The headrest allows for a head of a patient to be securely held in a desired position while the patient is lying on his or her back or stomach. (Specification, paragraph [0008]). The headrest has an approximately horseshoe-shape and includes a rest shell 10 with a central section 14 for supporting the rear of the head or the forehead of the patient. (Specification, paragraph [0009]). The support surface of the central section 14 has an approximately spherical shell shape. (*Id.*). The rest shell 10 also has two side sections 16 spaced from one another, the support surfaces of which approximately conform to a common cylindrical surface whose axis runs parallel to a line of symmetry 20 of the headrest running between the side sections 16. (*Id.*). Formed on each side section 16 is a cheekbone support 18 that projects toward the opposite side section 16. (*Id.*). The rest shell 10 also includes through going bores 40 in the rest shell 10 that allow a support cushion 12 (not shown in Figure 1) to be quickly and securely

connected to and removed from the rest shell 10. (Specification, paragraph [0012]).



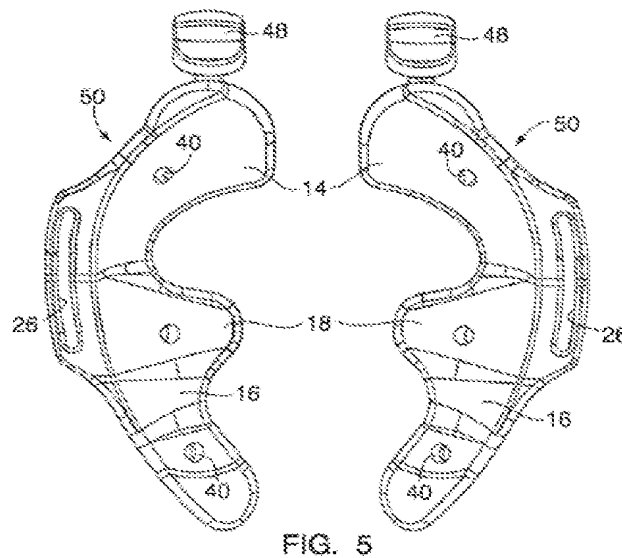
Drawings, Figure 1

As seen below in Figure 3, the support cushion 12 has a form that suits the shape of the rest shell (not shown in Figure 3) with a central section 32 and side section 34. (Specification, paragraph [0023]). On its side facing the rest shell, the support cushion 12 carries stick pins 36 which are essentially cylindrical and have a circumferential groove carrying an O-ring 38. (*Id.*). The stick pins 36 are insertable into and removable from the bores formed in the rest shell and provide a certain opposing resistance to insertion and removal. (*Id.*).



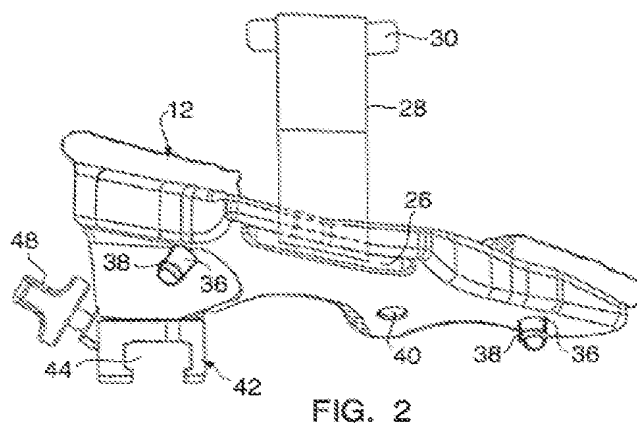
Drawings, Figure 3

As seen below in Figure 5, the rest shell can, in the alternative, take the form of two partial shells 50. The partial shells 50 are each provided with a fastening block 42 that connect the partial shells 50 to a shaped rail (as shown in Drawings, Figure 4). (Specification, paragraphs [0024]-[0025]).



Drawings, Figure 5

As seen below in Figure 2, the rest shell includes an eye 26 on the outer edge of each side section 16 for receiving a belt 28. (Specification, paragraph [0022]). The belt 28 fixes the head of a patient to the headrest. (*Id.*).



Drawings, Figure 2

Claim 1 is directed to a headrest for a patient-bearing surface. The headrest includes a rigid support shell having an approximately horseshoe-shaped form. (Specification, paragraphs [0009] and [0021]; Drawings, rest shell 10 of Figure 1 and partial shells 50 of Figure 5). The headrest also includes a support cushion that is releasably connectable with the support shell. (Specification, paragraphs [0012] and [0021]; Drawings, support cushion 12 of Figures 2-3). The support shell includes a central section for supporting the rear or forehead of a head of a patient and has a support surface of approximately spherical shell shape. (Specification, paragraphs

[0012] and [0021]; Drawings, central section 32 of Figure 3). The support shell also includes two side sections spaced from one another, the side sections each having a support surface of approximately a common cylindrical shape whose axis runs parallel to a line of symmetry of the support shell. (Specification, paragraph [0023]; Drawings, side sections 34 of Figure 3). The support shell also includes a cheekbone support on each of the side sections, each cheekbone support projecting toward the other side section. (Specification, paragraphs [0009]-[0010] and [0021]; Drawings, cheekbone supports 18 of Figures 1 and 5).

Claim 3 is directed to the headrest wherein the support shell is made of plastic. (Specification, paragraph [0011]).

Claim 4 is directed to the headrest wherein the support cushion on its side facing the support shell carries at least two stick pins designed for insertion into through going bores in the support shell. (Specification, paragraphs [0012] and [0023]; Drawings, stick pins 36 of Figures 2-3 and bores 40 of Figures 1-2 and 5).

Claim 5 is directed to the headrest wherein the stick pins each have a cylindrical shaft which the cylindrical shaft having an elastically resilient band with an external diameter slightly larger

than a diameter of the bores. (Specification, paragraphs [0012] and [0023]; Drawings, stick pins 36 of Figures 2-3).

Claim 6 is directed to the headrest wherein the support shell is divided into two mirror image similar partial shells along the line of symmetry. (Specification, paragraphs [0013] and [0025]; and Drawings, partial shells 50 of Figure 5).

Claim 7 is directed to the headrest wherein the support shell or each partial shell is connected to a fastening block for holding the support shell or partial shell to a profiled rail. (Specification, paragraphs [0013] and [0024]-[0025]; Drawings, fastening blocks 42 of Figures 2 and 4-5).

Claim 8 is directed to the headrest wherein an eye is formed on the outer edge of each side section for fastening a belt to fix the head of the patient to the headrest. (Specification, paragraphs [0014] and [0022]; Drawings, eye 26 of Figures 1-2 and 5 and belt 28 of Figure 2).

Claim 9 is directed to a headrest for a patient-bearing surface. The headrest includes a rigid support shell having an approximately horseshoe-shaped form. (Specification, paragraphs [0009] and [0021]; Drawings, rest shell 10 of Figure 1 and partial shells 50 of Figure 5). The headrest also includes a support cushion that is releasably connectable with the support shell. (Specification, paragraphs [0012]

and [0021]; Drawings, support cushion 12 of Figures 2-3). The support shell includes a central section for supporting the rear or forehead of a head of a patient and has a support surface of approximately spherical shell shape. (Specification, paragraphs [0012] and [0021]; Drawings, central section 32 of Figure 3). The support shell also includes two side sections spaced from one another, the side sections each having a support surface of approximately a common cylindrical shape whose axis runs parallel to a line of symmetry of the support shell. (Specification, paragraph [0023]; Drawings, side sections 34 of Figure 3). The support shell also includes a cheekbone support on each of the side sections, each cheekbone support projecting toward the other side section. (Specification, paragraphs [0009]-[0010] and [0021]; Drawings, cheekbone supports 18 of Figures 1 and 5). The side sections include end portions separated from each other to define an open region for mouthparts of the patient's face to fit therein. (Specification paragraphs [0009]-[0010] and [0021]; Drawings, Figures 1, 3 and 5).

(VI) Grounds of Rejection to be Reviewed on Appeal

- A. Whether claims 1 and 3-9 are properly rejected under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 6,490,737 to Mazzei et al. in view of U.S. Patent No. 4,279,038 to Bruckner et al.
- B. Whether claim 7 is properly rejected under 35 U.S.C. § 112, second paragraph, as having an insufficient antecedent basis.
- C. Whether rejected claim 8 is properly rejected under 35 U.S.C. § 112, second paragraph, as being indefinite.

(VII) Argument

A. Claims 1 and 3-9 are non-obvious over U.S. Patent No. 6,490,737 to Mazzei et al. ("Mazzei") in view of U.S. Patent No. 4,279,038 to Bruckner et al. ("Bruckner") under 35 U.S.C. § 103(a).

A *prima facie* case of obviousness under 35 U.S.C. § 103(a) is established when the teachings from the prior art itself appear to suggest the claimed subject matter to a person of ordinary skill in the art. *In re Bell*, 991 F.2d 781, 782, 26 U.S.P.Q. 1529, 1531 (Fed. Cir. 1993); *In re Rinehart*, 531 F.2d 1048, 1051, 189 U.S.P.Q. 143,146 (CCPA 1976). To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). "All words in a claim must be considered in judging the patentability of that claim against the prior art." *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970).

The Examiner bears the initial burden of presenting a *prima facie* case of obviousness. *In re Oetiker*, 997 F.2d 1443, 1445, 24 U.S.P.Q.2d 1443, 1444 (Fed. Cir. 1992). If the Examiner meets that burden, then the burden of coming forward with evidence or argument shifts to the applicant. If, on the other hand, the Examiner fails to meet that burden, then a rejection for obviousness is improper. *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q.2d 1596, 1598 (Fed. Cir. 1988).

Claim 1

Claim 1 recites a headrest for a patient-bearing surface, comprising a rigid support shell, the support shell having an approximately horseshoe-shaped form, and a support cushion releasably connectable with the support shell, wherein the support shell includes a central section for supporting the rear or forehead of a head of a patient and having a support surface of approximately spherical shell shape, two side sections spaced from one another, the side sections each having a support surface of approximately a common cylindrical shape whose axis runs parallel to a line of symmetry of the support shell, and a cheekbone support on each of the side sections, each cheekbone support projecting toward the other side section.

Mazzei teaches a protective cushion and cooperatively engageable helmet casing for anesthetized patient.

Bruckner teaches a headprotector made of elastic material for athletes.

Even if Bruckner were analogous art, Mazzei and Bruckner, either alone or in combination, would not render claim 1 obvious. For instance, the Examiner asserts that Figures 9-11 of Mazzei teach

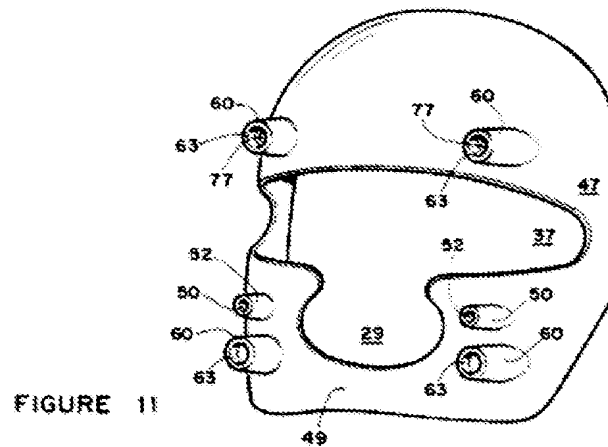
that *the support shell has an approximately horseshoe-shaped form*, as recited in claim 1. Applicant respectfully disagrees.

According to Webster's Third New International Dictionary, a horseshoe-shape is defined as "like a horseshoe". (Webster's Third New International Dictionary 1093 (3rd 1966)) ("Webster's") (attached hereto as Appendix A). Webster's depicts a "horseshoe" as follows:



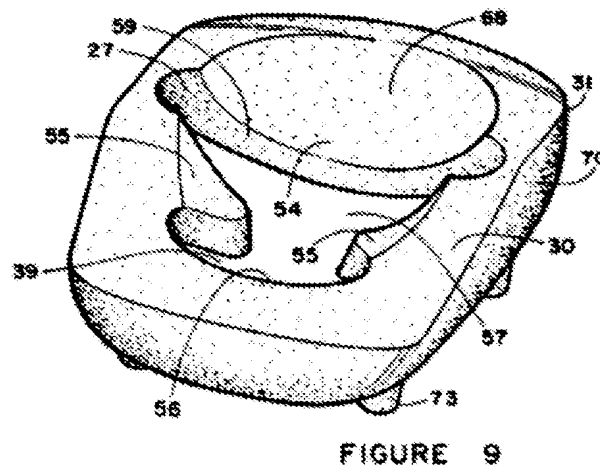
Webster's, underside of typical horseshoes

Mazzei does not teach or suggest that the protective helmet 10 *has an approximately horseshoe-shaped form* as recited in claim 1. Instead, as illustrated below in Figure 11, Mazzei teaches that the protective helmet 10 has a substantially spherical-shaped form with a square jaw-line, and certainly not a horseshoe-shaped form with an opening between two ends. (Mazzei, Figure 11).



Mazzei, Figure 11

Regarding Figure 9 of Mazzei, Figure 9 teaches that the protective helmet 10 has a substantially box-shaped form, and certainly not a horseshoe-shaped form with an opening between two ends. (Mazzei, Figure 9).



Mazzei, Figure 9

Regarding Figure 10 of Mazzei, Figure 10 illustrates a cross section of the protective helmet, not the protective helmet itself. (Mazzei, Figure 10). Thus, Mazzei does not teach that the protective helmet itself *has an approximately horseshoe-shaped form*, as recited in claim 1. Furthermore, Figure 10 of Mazzei does not even depict a horseshoe-shape.

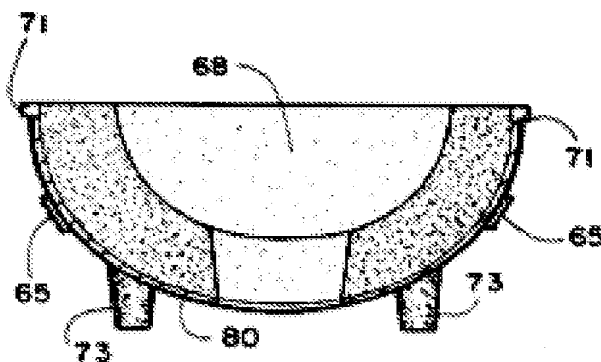


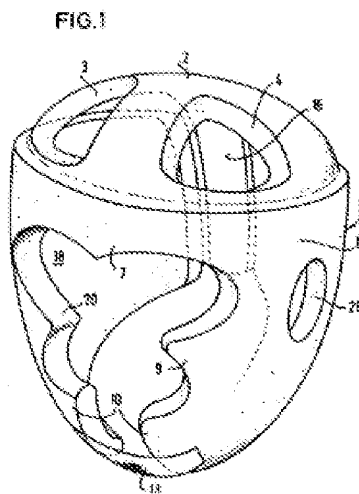
FIGURE 10

Mazzei, Figure 10

Thus, Mazzei does not teach or suggest that the protective helmet *has an approximately horseshoe-shaped form*, as recited in claim 1.

Bruckner does not teach or suggest that the protective helmet has an approximately horseshoe-shaped form, at least, in that the Examiner does not assert Bruckner in this respect. Moreover, if anything, Bruckner teaches that the protective helmet has a

substantially spherical-shaped form, not a horseshoe-shaped form, as illustrated below. (Bruckner, Figure 1).



Bruckner, Figure 1

Furthermore, Mazzei does not teach or suggest that the headrest has side sections each having a support surface of approximately a common cylindrical shape, as recited in claim 1. The Examiner admits that Mazzei does not teach this recitation. (Office Action dated March 4, 2009, page 4, lines 8-10).

Bruckner does not add to the teachings of Mazzei, at least in that Bruckner also does not teach or suggest that the headrest has side sections each having a support surface of approximately a common cylindrical shape, as recited in claim 1. As discussed above, the headprotector of Bruckner has a substantially spherical shape, including the bowl 10 that completely covers the chin and the lower

jaw. (Bruckner, Specification, column 3, lines 35-38; Figure 1). In fact, Bruckner refers to this portion of the headprotector as a "bowl", which specifically teaches a semi-spherical rather than cylindrical shape. (Bruckner, Abstract; Specification, column 3, lines 35-38). Thus, Bruckner does not teach or suggest that the headrest has *side sections each having a support surface of approximately a common cylindrical shape*, as recited in claim 1.

Therefore, Mazzei and Bruckner, either alone or in combination, do not teach or suggest **each and every** recitation of claim 1.

However, Bruckner should not even be considered because it is not analogous art.

To rely on a reference under 35 U.S.C. § 103, the reference must be analogous prior art. (MPEP § 2141.01(a)). The Examiner must determine what is "analogous prior art" for the purpose of analyzing the obviousness of the subject matter at issue. "Under the correct analysis, any need or problem known in the field of endeavor at the time of the invention and addressed by the patent [or application at issue] can provide a reason for combining the elements in the manner claimed." (KSR International Co. v. Teleflex Inc., 550 U.S. 398, 82 USPQ2d 1385, 1397 (2007)). Thus, a reference in a field different from that of applicant's endeavor may be reasonably pertinent if it is one

which, because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering his or her invention as a whole.

Under this analysis, Bruckner is non-analogous art. For instance, Bruckner is directed to a headprotector for athletes, which is designed to absorb kinetic energy and protect the wearer "from the harmful effects of hitting, punching and falling". (Bruckner, Specification, column 4, lines 10-11 and 27). The headprotector of Bruckner is not directed to a headrest for a patient bearing surface of any kind, for example, an operating table. (Specification, paragraph [0002]). Accordingly, Applicant respectfully submits that it would not have been obvious to look to the teachings of Bruckner for suggestions pertaining to a headrest as recited in the present invention.

Thus, the teachings of Bruckner should not be combined with the teachings of Mazzei.

Since neither Mazzei nor Bruckner, nor the combination thereof, teaches or suggests all the claim 1 recitations, Applicant respectfully submits that the Examiner has not presented a *prima facie* case of obviousness to support a 35 U.S.C. § 103(a) obviousness rejection of independent claim 1. Therefore, Applicant respectfully submits that

the rejection of claim 1 under 35 U.S.C. § 103(a) as being unpatentable over Mazzei in view of Bruckner is improper, and should be withdrawn.

Claims 3-8

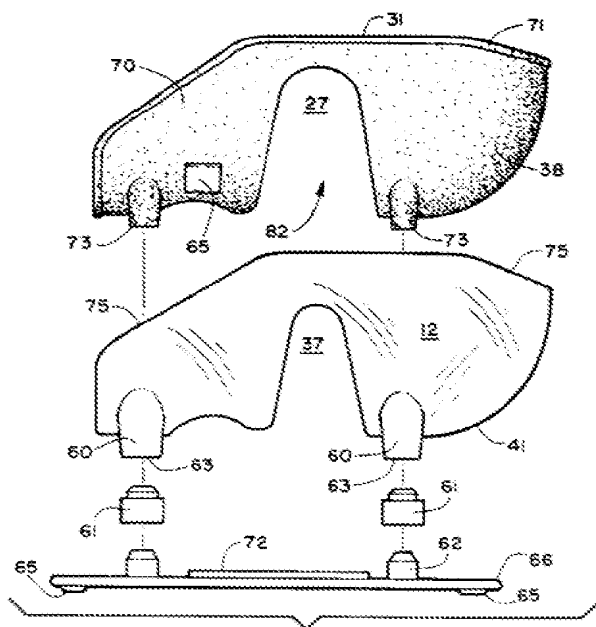
Claims 3-8 depend, either directly or indirectly, from claim 1 and include additional recitations thereto. Accordingly, Applicant respectfully submits that the rejection of claims 3-8 under 35 U.S.C. § 103(a) as unpatentable over Mazzei in view of Bruckner is improper for at least the same reasons discussed above and should be withdrawn.

Claim 5

Claim 5, which depends from claims 1 and 4, recites that the stick pins each have a cylindrical shaft which the cylindrical shaft having an elastically resilient band with an external diameter slightly larger than a diameter of the bores.

The Examiner asserts that Mazzei teaches that “each pin [has] a cylindrical shaft with cylindrical shaft (61, see fig 7) and each has an elastically resilient band with an external diameter slightly larger than the diameter of bores (see fig 7).” (Office Action dated March 4, 2009, page 5, lines 14-16).

Mazzei does not teach or suggest that *the stick pins each have a cylindrical shaft which the cylindrical shaft having an elastically resilient band*, as recited in claim 5. In fact, Mazzei does not teach or suggest *an elastically resilient band* in any way. The Examiner asserts that Figure 7 of Mazzei teaches this recitation. (Office Action dated March 4, 2009, page 5, lines 14-16). However, upon examination of Figure 7 of Mazzei, Applicant can find no teaching or even remote suggestion of a *stick pin having a cylindrical shaft each having an elastically resilient band*, as recited in claim 5. (Mazzei, Figure 7) (shown below).

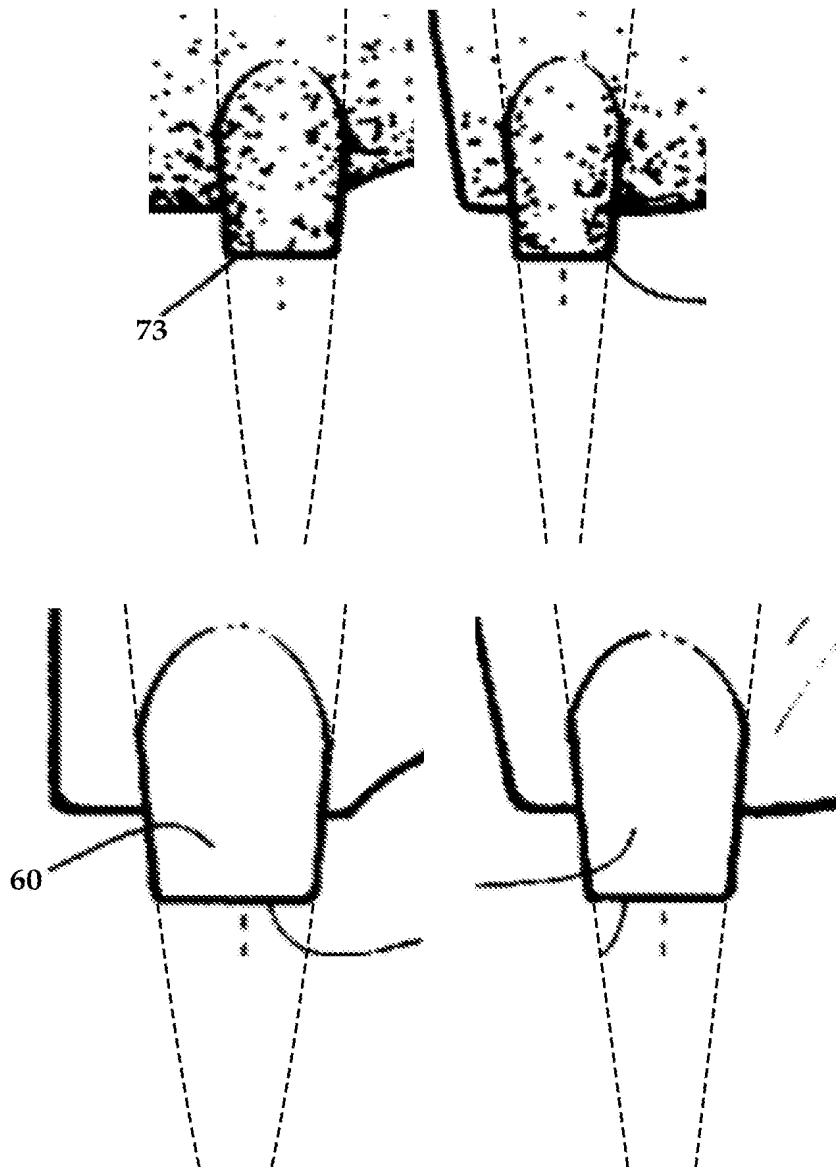


Mazzei, Figure 7

Thus, Mazzei does not teach or suggest *the stick pins each have a cylindrical shaft which the cylindrical shaft having an elastically resilient band*, as recited in claim 5.

Bruckner does not add to the teachings of Mazzei, at least, in that the Examiner does not assert Bruckner in this respect.

Further, Mazzei does not teach or suggest that *the stick pins each have a cylindrical shaft*, as recited in claim 5. If anything, Mazzei teaches away from this recitation because Mazzei teaches registration pins 73 that are substantially conical cross sections, which are not cylindrical. (Mazzei, Figure 7). For instance, if contour lines of the registration pins 73 were extended, the counter lines of the registration pins 73 would eventually converge into a point, which means the registration pins 73 are cone-shaped. The geometry of the registration pins 73 is accentuated in the close-ups of Figure 7 of Mazzei, presented below with extensions of the contour lines added on dotted lines.



Mazzei, Figure 7 (close-ups)

Moreover, the legs 60 that receive the registration pins 73 are also conical cross sections, which are not cylindrical. Thus, the registration pins 73 of Mazzei, and the legs 60 that receive them, teach away from stick pins that each have a cylindrical shaft, as recited in claim 5.

Therefore, neither Mazzei nor Bruckner, nor the combination thereof, teaches or suggests all claim 5 recitations. Accordingly, Applicant respectfully submits that the rejection of claim 5 under 35 U.S.C. § 103(a) as being unpatentable over Mazzei in view of Bruckner is improper for at least these additional reasons, and should be withdrawn.

Claim 9

Claim 9 recites a headrest for a patient-bearing surface comprising a rigid support shell having an approximately horseshoe-shaped form, and a support cushion releasably connectable with the support shell, wherein the support shell includes a central section for supporting the rear or forehead of a head of a patient and having a support surface of approximately spherical shell shape, two side sections spaced from one another, the side sections each having a support surface of approximately a common cylindrical shape whose axis runs parallel to a line of symmetry of the support shell, and a cheekbone support on each of the side sections, each cheekbone support projecting toward the other side section, and wherein the side sections include end portions separated from each other to define an open region for mouthparts of the patient's face to fit therein.

As discussed above, Mazzei and Bruckner, either alone or in combination, do not teach or suggest *a rigid support shell having an approximately horseshoe-shaped form or side sections each having a support surface of approximately a common cylindrical shape*, as recited in claim 9.

Furthermore, as discussed above, it would not have been obvious to combine the teachings of Bruckner with the teachings of Mazzei, at least, in that Bruckner is non-analogous art.

Since neither Mazzei nor Bruckner, nor the combination thereof, teaches or suggests all the claim 9 recitations, Applicant respectfully submits that the Examiner has not presented a *prima facie* case of obviousness to support a 35 U.S.C. § 103(a) obviousness rejection of independent claim 9. Therefore, Applicant respectfully submits that the rejection of claim 9 under 35 U.S.C. § 103(a) as unpatentable over Mazzei in view of Bruckner is improper for these reasons, and should be withdrawn.

B. Claim 7 can be readily amended to cure the antecedence issue.

Claim 7, which depends from claim 1, recites that the support shell or each partial shell is connected to a fastening block for holding the support shell or-partial shell to a profiled rail.

As it stands, claim 7 lacks antecedent basis for the recitation of the “partial shell”. However, claim 7 can be amended to depend from claim 6, thereby curing the antecedence issue.

C. Claim 8 is not indefinite.

Claim 8 recites that an eye is formed on the outer edge of each side section for fastening a belt to fix the head of the patient to the headrest. The Examiner asserts that the “belt” is indefinite.

Applicant respectfully submits that the “belt” is not indefinite as it is both shown in Figure 2 (belt 28) and described in, at least, paragraphs [0014] and [0022]. See also Drawings, Figures 1 and 5.

In view of the foregoing, Applicant respectfully requests that the Board reverse the rejection of claims 1 and 3-9 under 35 U.S.C. § 103(a) as improper and the rejections of claims 7 and 8 under 35 U.S.C. § 112, second paragraph, as moot, and direct that claims 1 and 3-9 be passed to issue.

Conclusion

Having shown the errors and deficiencies of the present rejections, Appellant respectfully submits that no sufficient reason

Application No. 10/534,837
Office Action dated March 4, 2009
Appeal Brief dated September 3, 2009

has been shown why the present claims might not be patentable over the cited prior art. Accordingly, Appellant respectfully requests that the Board direct that all pending claims be promptly passed to issue.

Pursuant to 37 CFR § 41.20(b)(2), Applicant hereby authorizes the charge of \$540.00, to cover the fee for filing this Appeal Brief, to be charged to our Deposit Account No. 13-0235.

Applicant hereby petitions for a one-month extension of time to respond to the outstanding Notice of Appeal. Applicant's Attorneys hereby authorize the Commissioner to charge the one-month extension fee of \$130 to the Deposit Account 13-0235. Applicant believes no additional fees are due in connection with this Appeal Brief. If any additional fees are deemed necessary, please charge them to Deposit Account No. 13-0235.

Respectfully submitted,

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(VIII) Claims Appendix

1. (Rejected) A headrest for a patient-bearing surface, comprising:
a rigid support shell, the support shell having an approximately horseshoe-shaped form; and
a support cushion releasably connectable with the support shell;
wherein the support shell includes a central section for supporting the rear or forehead of a head of a patient and having a support surface of approximately spherical shell shape, two side sections spaced from one another, the side sections each having a support surface of approximately a common cylindrical shape whose axis runs parallel to a line of symmetry of the support shell, and a cheekbone support on each of the side sections, each cheekbone support projecting toward the other side section.
2. Cancelled.
3. (Rejected) The headrest according to claim 1, wherein the support shell is made of plastic.

4. (Rejected) The headrest according to claim 1, wherein the support cushion on its side facing the support shell carries at least two stick pins designed for insertion into through going bores in the support shell.
5. (Rejected) The headrest according to claim 4, wherein the stick pins each have a cylindrical shaft which the cylindrical shaft having an elastically resilient band with an external diameter slightly larger than a diameter of the bores.
6. (Rejected) The headrest according to claim 1, wherein the support shell is divided into two mirror image similar partial shells along the line of symmetry.
7. (Rejected) The headrest according to claim 1, wherein the support shell or each partial shell is connected to a fastening block for holding the support shell or partial shell to a profiled rail.
8. (Rejected) The headrest according to claim 1, wherein an eye is formed on the outer edge of each side section for fastening a belt to fix the head of the patient to the headrest.

9. (Rejected) A headrest for a patient-bearing surface comprising:
a rigid support shell having an approximately horseshoe-shaped form; and

a support cushion releasably connectable with the support shell;

wherein the support shell includes a central section for supporting the rear or forehead of a head of a patient and having a support surface of approximately spherical shell shape, two side sections spaced from one another, the side sections each having a support surface of approximately a common cylindrical shape whose axis runs parallel to a line of symmetry of the support shell, and a cheekbone support on each of the side sections, each cheekbone support projecting toward the other side section; and

wherein the side sections include end portions separated from each other to define an open region for mouthparts of the patient's face to fit therein.

Application No. 10/534,837
Office Action dated March 4, 2009
Appeal Brief dated September 3, 2009

(X) Evidence Appendix

Webster's Third New International Dictionary 1093 (3rd 1966)
(defining "horseshoe").

Application No. 10/534,837
Office Action dated March 4, 2009
Appeal Brief dated September 3, 2009

(XI) Related Proceedings Appendix

None.